

Cleveland State University
EngagedScholarship@CSU



Cleveland State Law Review

Law Journals

1988

When the Teachers and Parents Can't Agree, Who Really Decides - Burdens of Proof and Standards of Review under the Education for All Handicapped Children Act

Thomas F. Guernsey
University of Richmond

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [Education Law Commons](#), and the [Legislation Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Thomas F. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides - Burdens of Proof and Standards of Review under the Education for All Handicapped Children Act*, 36 Clev. St. L. Rev. 67 (1988)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol36/iss1/11>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

WHEN THE TEACHERS AND PARENTS CAN'T AGREE, WHO REALLY DECIDES? BURDENS OF PROOF AND STANDARDS OF REVIEW UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

THOMAS F. GUERNSEY*

I.	INTRODUCTION	67
II.	THE ACT.	70
III.	BURDEN OF PROOF UNDER THE ACT	71
	A. <i>Burden of Persuasion on Substantive Issues</i>	72
	B. <i>Burden of Proof on Procedural Issues</i>	74
IV.	THE NATURE OF JUDICIAL DEFERENCE TO ADMINISTRATIVE DETERMINATIONS UNDER THE ACT.	77
	A. <i>Traditional Administrative Review</i>	77
	B. <i>What Is Due Weight and to Which Issues Does It Apply?</i>	78
	C. <i>To Whom/To What Should Due Weight Be Given?</i>	86
	1. The LEA?	86
	2. The Local Hearing Officer or to the State Review Officer?	86
V.	APPELLATE REVIEW OF JUDICIAL DETERMINATIONS	89
VI.	CONCLUSION	93

I. INTRODUCTION

In 1975, the United States Congress passed, and President Ford signed into law, the Education for All Handicapped Children Act (hereinafter the Act or EAHCA).¹ The key provision of the Act was that each handicapped child was entitled to a Free and Appropriate Public Education (hereinafter FAPE).² Congress provided extensive procedural pro-

* Professor of Law, University of Richmond. B.A. 1973, University of Michigan; J.D. 1976, Wayne State University; LL.M. 1980, Temple University. Member, New Hampshire and Virginia Bars. The author wishes to express his appreciation to the Faculty Research Committee of the University of Richmond and the Virginia Law Foundation for their support in writing this Article. The author also thanks William Klare for his helpful comments.

¹ 20 U.S.C §§ 1401-61 (1982).

² *Id.* § 1412(2)(B).

tections to ensure that the school authorities provided children with a FAPE.³ The extensive procedural protections included parental participation in most decisions affecting the child's educational program.⁴

As a means of enforcing these parental rights and agency responsibilities, Congress mandated that each State Education Authority (hereinafter SEA) create an administrative due process hearing mechanism.⁵ Congress then provided for review of that administrative procedure by either a state or federal court.⁶

Virtually every important educational decision affecting the child's program can lead to a dispute, which in turn can lead to a due process hearing and judicial proceedings.⁷ The ultimate decision, whether made by the Local Education Authority (hereinafter LEA), SEA, the due process hearing officer, or a judge, is ultimately determined, in large measure, by the allocation of the burden of proof and the willingness of one participant in the process (hearing officer, judge, parent, SEA, or LEA) to defer or not to other participants. Yet, among the most perplexing evidentiary and procedural issues, given judicial interpretation of the due process requirements and the specificity of the due process protec-

³ *Id.* §§ 1412(5)(B)-(C), 1415.

⁴ *Id.* §§ 1414(a)(1)(c)(iii), 1415(b)(1).

⁵ *Id.* § 1415(b)(2).

⁶ *Id.* § 1415(e).

⁷ *Id.* § 1415(b)(2), (e). The United States Supreme Court first had occasion to interpret the Act in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court addressed two issues: "What is meant by the Act's requirement of a 'free and appropriate education'? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415?" *Id.* at 186. Two years later in *Smith v. Robinson*, 468 U.S. 992 (1984), the Court addressed whether the EAHCA was intended by Congress to be the exclusive remedy or whether aggrieved parents could seek relief for discrimination in education by bringing equal protection claims under 42 U.S.C. § 1983 or under § 504 of the Handicapped Rehabilitation Act of 1973. These two cases together raised, but did not adequately answer, important issues of procedure which go to the very heart of determining whether a child is indeed receiving a free and appropriate education.

The Supreme Court in *Rowley* made it clear that the importance of procedural safeguards provided in the EAHCA "cannot be gainsaid." 458 U.S. at 205. The procedural provisions of the Act were, as pointed out in *Rowley*, stressed by Congress: "Adequate compliance with the procedures [will] in most cases assure much if not all of what Congress wished in the way of substantive content in an individualized education program." *Id.* at 206.

It is the procedural requirements demanded by the EAHCA, therefore, that provide the first line of protection to the students and their parents. In fact, the Supreme Court requires a two-part test in cases arising under the EAHCA: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit?" *Id.* at 206-07.

The Supreme Court further stressed the importance of faithful compliance with the procedural mechanism of the EAHCA in *Smith*. In *Smith*, the Court stated that the procedures "effect Congress' intent that each child's individual educational needs be worked out through a process that . . . includes . . . detailed procedural safeguards." 468 U.S. at 1011.

tions in the Act, are the questions of burden of proof and the standard of review in court and in administrative proceedings under the Act.

Section 1415(e)(2) of the Act states in part, "In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on a preponderance of the evidence, shall grant such relief as the court determines is appropriate."⁸

Although the statute is explicit that the standard of proof is to be by a preponderance of the evidence, there is no specific indication as to which party shall bear the burdens of production and of persuasion. In the absence of this specificity, courts have reached different interpretations.⁹

Further, although the Act clearly envisions judicial review, the scope of that review is unclear, and courts have reached different interpretations of that scope. Indeed, despite the Act's intermingling of the standard of proof with the provision for judicial review, at least implying a complete *de novo* review by the court, the United States Supreme Court in *Hendrick Hudson District Board of Education v. Rowley*¹⁰ gave some indication that section 1415(e)(2) might not be read as allowing the district court complete *de novo* powers of review when it held:

[T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were simply to set decisions at naught. The fact that § 1415(e) requires the reviewing court "receive the records of the [state] (sic) administrative proceedings" carries with it the implied requirement that *due weight* shall be given to these proceedings.¹¹

Clearly the Court contemplated that the administrative determination should be accorded some significant role in the judicial decision. Just what that role is remains unclear. There is the obvious question of what is due weight. There is also confusion in the Court's language as to whether it requires due weight be given to the LEA, the due process hearing officers, or the SEA.

On the one hand, the Court said, "[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no

⁸ 20 U.S.C. § 1415(e)(2) (1982).

⁹ See *infra* notes 33-63 and accompanying text.

¹⁰ 458 U.S. 176 (1982).

¹¹ *Id.* at 206 (emphasis added). See also *infra* notes 73-78 and accompanying text.

means an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review"¹² This language implies that due weight is to be given the LEA. On the other hand, the Supreme Court's statement "that Section 1415(e) requires the reviewing court 'receive the records of the [state] (sic) administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings"¹³ and implies that the due weight should be given the due process hearing officers' decisions.

II. THE ACT

The key provision of the EAHCA is the requirement that each handicapped child be provided a free and appropriate public education.¹⁴ To ensure implementation of this mandate, Congress required state and local school authorities to establish systems which would first identify those children in need of special education.¹⁵ Congress then provided extensive procedural protections to ensure that the school authorities provide those identified children with a FAPE.¹⁶

The extensive procedural protections included parental consent or involvement in many decisions affecting the child's educational program.¹⁷ Congress also required multidisciplinary and nondiscriminatory testing.¹⁸ In what is perhaps the most far-reaching requirement, Congress required the LEA to develop, at least annually, an Individualized Education Program (hereinafter IEP) for each handicapped child.¹⁹ The IEP is to state the child's present level of educational functioning and to articulate both long and short term educational goals and objectives.²⁰

To ensure that the parents had sufficient information available to participate in the educational decisionmaking, Congress provided the parents with the right to have an Independent Educational Evaluation (IEE) at public expense.²¹ The IEE, like the school system's evaluation, is to be multidisciplinary.²²

On the substantive level of what constitutes a FAPE, Congress provided very little guidance, though it did indicate that placements

¹² 458 U.S. at 206.

¹³ *Id.*

¹⁴ See *supra* note 2.

¹⁵ 20 U.S.C. § 1412(2)(C) (1982).

¹⁶ *Id.* §§ 1412(5)(B)-(C), 1415.

¹⁷ *Id.* §§ 1414(a)(1)(c)(iii), 1415(b)(1).

¹⁸ *Id.* § 1412(5)(C); 34 C.F.R. § 300.532 (1986).

¹⁹ 20 U.S.C. §§ 1412(4), 1414(a)(5) (1982); 34 C.F.R. § 300.343(d) (1986).

²⁰ 20 U.S.C. § 1401(19) (1982); 34 C.F.R. § 300.346 (1986).

²¹ 20 U.S.C. § 1415(b)(1)(A) (1982); 34 C.F.R. § 300.503 (1986).

²² 34 C.F.R. § 300.503(e) (1986).

should be in the least restrictive environment.²³ Congress was, however, very explicit when it came to the procedural protections to which the parents and the child were entitled.

The EAHCA and its supporting regulations identify clear procedural steps to be followed in the process that moves from identification of a child in need of special education to provision of a FAPE. First, the child must be identified.²⁴ Then the child is evaluated by the multidisciplinary team.²⁵ Following evaluation, a meeting is convened to determine the child's eligibility for special education.²⁶ After an eligibility determination, an IEP is developed with parental participation.²⁷ Following development of an IEP, a placement decision is made, based on the goals and objectives contained in the IEP.²⁸ As stated before, the IEP must then be reviewed at least annually. In addition, the child must be re-evaluated at least every three years.²⁹

If at any point in this process there is a disagreement between parents and the LEA, a due process hearing may be requested.³⁰ Following this administrative hearing, the state may provide a state-level review.³¹ Following this administrative process, suit may be filed in either state or federal court.³²

III. BURDEN OF PROOF UNDER THE ACT

Burden of proof refers to two distinct questions: who has the burden of producing evidence on a particular issue and who has the burden of persuasion on a particular issue? Failure to produce evidence will result in a finding against the party bearing that burden. Once evidence is produced, however, there remains the separate question of whether the evidence persuades the fact finder under one of the applicable standards of proof, preponderance of the evidence, clear and convincing, or beyond a reasonable doubt.³³ In determining which party has the burden of persuasion, one must take into account such things as who pled the fact, what is judicially convenient, what is fair, and what special policy con-

²³ 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (1982); 34 C.F.R. § 300.550-.554 (1986).

²⁴ 20 U.S.C. § 1414(a)(1)(A) (1982); 34 C.F.R. § 300.220 (1986).

²⁵ 20 U.S.C. § 1412(5)(C) (1982); 34 C.F.R. § 300.531 (1986).

²⁶ 34 C.F.R. § 300.345 (1986).

²⁷ 20 U.S.C. § 1401(19) (1982); 34 C.F.R. § 300.345 (1986).

²⁸ 34 C.F.R. § 300.552(a)(2) (1986), .342(b)(1); *see also* 34 C.F.R. § 300, app. C, question 42 at 84 (1986).

²⁹ 20 U.S.C. § 1412(5)(c) (1982); 34 C.F.R. § 300.534(b) (1986).

³⁰ 20 U.S.C. § 1415(b)(2) (1982).

³¹ *Id.* § 1415(c).

³² *Id.* § 1415(e)(1).

³³ C. McCORMICK, ON EVIDENCE 947 (E. Cleary 3d ed. 1984).

siderations might come into play.³⁴ The primary concern of this Article is the allocation of the burden of persuasion, though it will become apparent that allocating the burden of production may aid in determining who should have the burden of persuasion.

A. Burden of Persuasion on Substantive Issues

The Act requires that disputes be heard by the local due process hearing officer.³⁵ The Act, however, is unclear as to which party is to carry the burden of persuasion. Courts, hearing officers, and state review officers are split, though the majority appear to place the burden of persuasion on the party seeking to change the status quo.

For example, in *Tatro v. Texas* (hereinafter *Tatro II*),³⁶ the Court of Appeals for the Fifth Circuit confirmed this allocation of the burden in EAHCA matters. In *Tatro II*, the issue was whether a child's need for clean intermittent catheterization fell within the requirements of the EAHCA. On the issue of burden of proof, the court held:

[W]e are convinced that the central role of the IEP in the educational scheme contemplated by the EAHCA and in the standard of review developed in *Rowley* gives rise to a presumption in favor of the educational placement established by Amber's IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.³⁷

In *Doe v. Brookline School Committee*,³⁸ the SEA determined that the LEA's IEP was inadequate and inappropriate. Although confronted with the issue of whether the LEA would have to continue funding of the disputed placement, the Court of Appeals for the First Circuit clearly stated who should have the burden of proof:

We hold that in view of the congressional preference for maintenance of the current educational placement, a party that seeks to modify an existing educational placement, program or services must proceed by a motion for preliminary injunction. As with

³⁴ *Id.* at 952.

³⁵ Although 20 U.S.C. § 1415 (e)(2) (1982) indicates that the court will use a preponderance of the evidence standard, the Act and supporting regulations are silent on the standard to be used by the hearing officer. See *Id.* § 1415(b)(2); 34 C.F.R. § 300.506-.509.

³⁶ 703 F.2d 823 (5th Cir. 1983).

³⁷ *Id.* at 830.

³⁸ 722 F.2d 910 (1st Cir. 1983).

issues of funding interim placement, . . . the party seeking modification of the status quo should bear the burden of proof.³⁹

The most articulate opinion for determining who has the burden was written in *Burger v. Murray County School District*.⁴⁰ In that case, the district court was directly confronted with the issue of who had the burden of proof to establish the appropriateness of the LEA's decision to remove a child from a residential placement and transfer him into a self-contained learning disabilities class. Citing *Tatro II*,⁴¹ the court held that "when the suggestion is made that a child, who falls under the aegis of the EAHCA and is currently learning in what has been deemed to be an appropriate setting, be moved to a different facility, the party advocating the move should bear the burden of proving its propriety."⁴²

Courts have also placed the burden of persuasion on the LEA when it is the parents who are seeking to change the status quo. In *Davis v. District of Columbia Board of Education*,⁴³ the parents filed for the due process hearing, alleging that the LEA had failed to provide a placement for their child. The district court, without stating reasons, held that the LEA had failed to meet its burden of proof.⁴⁴

Other courts have used broad language in allocating the burden of proof while holding that parents have the burden. In *Bales v. Clarke*,⁴⁵ the parents were advocating a change in the child's placement. The parents were also seeking reimbursement for expenses of a summer program in which they had unilaterally placed their child. The court used broad language in imposing the burden on the parents, but did not

³⁹ *Id.* at 919; see also *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir. 1981) ("In light of the remedial purposes of these statutes [EAHCA and § 504], we find that the burden is on the local and state defendants. . . . Our conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal to know or assert their rights under either the EHA or section 504."); *Lang v. Braintree School Comm.*, 545 F. Supp. 1221 (D. Mass. 1982) (the burden of proof on the LEA in attempt to change from private to public school); *Davis v. District of Columbia Bd. of Educ.*, 530 F. Supp. 1209 (D.D.C. 1982) (burden of proof on LEA).

⁴⁰ 612 F. Supp. 434 (N.D. Ga. 1984).

⁴¹ *Id.* at 437.

⁴² *Id.* The Third Circuit also places the burden of proof on the LEA. In *Grymes v. Madden*, 672 F.2d 321 (3d Cir. 1982), the court upheld the district court award of a full tuition grant because the LEA had "failed to sustain its burden of proof that an appropriate public program existed." *Id.* at 322; see also *Silvio v. Commonwealth*, 1981-1982 EHLR DEC. 533:577 (Pa. Commonw. Ct. 1982) (burden of proof on the LEA).

⁴³ 530 F. Supp. 1209 (D.D.C. 1982).

⁴⁴ *Id.* at 1211-12; see also *Lang v. Braintree School Comm.*, 545 F. Supp. 1221, 1228 (D. Mass. 1982). At least one jurisdiction has promulgated a state regulation placing the burden of proof on the LEA. See *Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir. 1982).

⁴⁵ 523 F. Supp. 1366 (E.D. Va. 1981) (Warriner, J.). See also *Cothorn v. Mallory*, 565 F. Supp. 701, 705-08 (W.D. Mo. 1983).

explain why the burden was placed upon the parents.⁴⁶ In light of the factual setting, therefore, it is hard to say whether *Bales* stands for the proposition that the parents must always bear the burden, or whether it stands for the application of the status quo rule.

Placing the burden of proof on the party seeking to change the status quo is consistent with the underlying theory of allocation of all burdens of proof. McCormick points out that "[t]he burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."⁴⁷

Such an allocation on issues of substance makes good sense. Given protections within the Act, most importantly the requirement that the LEA provide an IEE,⁴⁸ and the right of parents to have access to a child's educational records,⁴⁹ there seems little reason for parents or the school system to need special protection or help in establishing substantive allegations concerning the child.

B. Burden of Proof on Procedural Issues

While traditional doctrine may work well on substantive issues, there is a strong argument that the LEA should bear more responsibility for the burden of persuasion on procedural issues regardless of which party is seeking to change the status quo. As stated by the United States Supreme Court, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process."⁵⁰

⁴⁶ For a severe criticism of *Bales*, see *Burger v. Murray County School Dist.*, 612 F. Supp. 434 (N.D. Ga. 1984). See also text accompanying note 40.

Courts have also placed the burden of persuasion on the party challenging the previous administrative determination in what is apparently a confusion of the difference between standard of review and burden of proof. *E.g. McKenzie v. Jefferson*, 566 F. Supp. 404, 406 (D.D.C. 1983); *Cohen v. School Bd.*, 450 So. 2d 1238, 1241 (Fla. App. 1984); see generally *infra* text and accompanying note 105.

The court in *Town of Burlington v. Department of Education*, 736 F.2d 773, 794 (1st Cir. 1985), *aff'd on other grounds*, 471 U.S. 359 (1986), placed the burden on the parents "because it structurally assists courts in according the administrative agency's expertise the respect it is owed, an approach *Rowley* implicitly encourages." See also *Tracey T. v. McDaniel*, 610 F. Supp. 947 (N.D. Ga. 1985). Rather than meeting the requirement in *Rowley* to give "due weight" to the administrative proceedings, see *infra* notes 107-25 and accompanying text, this minority position gives deference to an opposing party in a law suit. Such deference would make judicial review meaningless. See generally *infra* notes 107-08 and accompanying text.

⁴⁷ McCormick, *supra* note 33, at 949.

⁴⁸ See *supra* note 21 and accompanying text.

⁴⁹ 20 U.S.C. § 1415(b)(1)(A) (1982).

⁵⁰ *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982)(emphasis added).

Procedural violations as a result have assumed increased importance in disputes between the LEA and the parents.⁵¹

As stated by the Supreme Court in *Rowley* in its discussion of judicial inquiry into cases brought under the Act, the first consideration is whether or not "the state complied with the procedures set forth in the Act."⁵² The Court added that such inquiry will require a court not only "to satisfy itself that the state has adopted the state plan, policies and assurances required by the Act, but also to determine that the state has created an IEP which conforms with the requirements of Section 401(19)."⁵³ Therefore, *Rowley* imposes an affirmative requirement that inquiry be made into procedural compliance.

Since it is the LEA's responsibility to ensure the procedural rights of the parents,⁵⁴ it is arguably the LEA which must carry this burden. Allocating the burden of proof to the LEA to show compliance with procedural requirements is consistent with the underlying purpose of the EAHCA which was remedial in nature.⁵⁵

In *S-1 v. Turlington*⁵⁶, a handicapped student was expelled. The LEA claimed that the parents had waived their right to establish that the LEA had failed to show the absence of a causal connection between the handicap and the student's misconduct. The court held, however, that there was no waiver, because it was the duty of the school system to show that there was no causal connection between the handicap and the expulsion. The court stated that "[t]he issue is therefore squarely presented whether the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap is on the state and local officials or the student."⁵⁷ In other words, the burden was on the school to establish that it had followed the correct decision-making process and did not expel the child for a manifestation of his handicap.

The court in *Turlington* went on to state:

⁵¹ See, e.g., *Jackson v. Franklin County School Bd.*, 806 F.2d 623 (5th Cir. 1986) (procedural violations sufficient to support finding that LEA has failed to provide FAPE); *Hall v. Vance*, 774 F.2d 629, 635 (4th Cir. 1985) (procedural violations sufficient to support finding that LEA has failed to provide FAPE).

⁵² 458 U.S. at 206.

⁵³ *Id.* at 206-07 n.27.

⁵⁴ 20 U.S.C. § 1415(a) (1982).

⁵⁵ See Clune & VanPelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 12-20 (1985); see also Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 67-72 (1985). See generally *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir. 1981) ("In light of the remedial purposes of these statutes. . .").

⁵⁶ 635 F.2d 342 (5th Cir. 1981).

⁵⁷ *Id.* at 348-49.

[I]n light of the remedial purposes of these statutes we find that the burden is on the local and state defendants to make this determination. Our conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal to know or assert their rights under either EHA or section 504.”⁵⁸

Since the procedural rights of the Act were designed to remedy a problem, it is logical that the agency seeking a remedy show that it has indeed complied.

As a further reason for allocating the burden of proof for procedural violations to the LEA, it should be kept in mind that the aids available to the parent on the substantive issues, such as an IEE and access to documents, are of more limited use when it comes to procedural violations. Formal discovery procedures are not available at the administrative level, and evidence of procedural violations may not be in the student's educational records.⁵⁹

When there are allegations of procedural violations, the better policy would be to place at least some portion of the burden upon the LEA. Two methods come to mind. First, the LEA could be allocated the burden of production on the issue of procedural compliance. Failure to produce evidence sufficient to meet the burden of production⁶⁰ would result in a decision against the LEA. Upon production of sufficient evidence, the burden of persuasion would remain with the parents. This approach has the advantage of addressing the concern that the evidence is peculiarly within the control of one party. This approach, however, does not adequately meet the underlying concern that the Act by its very nature is remedial and that the policy establishing it argues strongly that the LEA also should have the burden of persuasion.

A second approach would be to adopt a policy of allocation analogous to that used by some courts in actions arising under the the Civil Rights Act of 1964.⁶¹ In essence what would be required is the opposite of the first approach. The parents would have the burden of producing evidence sufficient for the hearing officer or court to find reasonable grounds to believe that a procedural violation exists, and then the burden of production shifts to the LEA. This would be perhaps analogous to the

⁵⁸ *Id.*

⁵⁹ For example, it is conceivable that the school system, in violation of the Act, has decided that it will not place children in residential programs. See *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983). Evidence of this policy decision is most likely to exist in records other than the child's educational file.

⁶⁰ The standard by which it is determined whether there has been a sufficient production of evidence has been described as “such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved.” C. McCORMICK, *supra* note 33, at 953.

⁶¹ 42 U.S.C. § 2000(e) (1982).

requirement that once the plaintiff under Title VIII of the Civil Rights Act of 1964 establishes a *prima facie* case, the burden of production shifts to the defendant.⁶² This approach would both conform to the recognition that evidence of procedural propriety is usually within the control of the LEA, while giving effect to the remedial nature of the Act.

Under this second approach, the evidence sufficient to meet the parents' burden of production should be minimal, given difficulties of proof and the importance of the issue. The standard should be no more than an allegation of a specific violation of a procedural right provided by the Act or its supporting regulations along with information sufficient to allow a reasonable person to infer the existence of that procedural violation.⁶³

IV. THE NATURE OF JUDICIAL DEFERENCE TO ADMINISTRATIVE DETERMINATIONS UNDER THE ACT

A. *Traditional Administrative Review*

In exploring questions of what weight should be given to the administrative determination and at what level of the administrative process that weight should be given under the EAHCA, it is first necessary to understand traditional judicial review of administrative determinations. In traditional administrative settings, the judicial scope of review is controlled by at least three concerns.

The first two concerns are related to the purpose in setting up the agency procedure. First, the scope of the judicial review is limited by the belief that deference should be given to agency experts.⁶⁴ Second, the scope of review is limited by the belief that courts should defer to the agency because expediency will otherwise be lost. Without limited review the administrative proceeding becomes merely an added layer causing delay rather than expediting matters.⁶⁵ The third concern limiting review is common to all appeals; that is, a degree of deference should be given to the fact finder who has heard the evidence first hand.⁶⁶

These three concerns have led to what might be called a typical or traditional standard of the appropriate review of administrative determinations. This traditional approach leans heavily on the belief that a court should show significant deference to the agency. Specifically, the

⁶² *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981). *See also* 42 U.S.C. §§ 3601-3631 (1982)(Title VIII); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

⁶³ *See supra* note 60.

⁶⁴ B. SCHWARTZ, *ADMINISTRATIVE LAW* 585 (2d ed. 1984).

⁶⁵ *Id.*

⁶⁶ *See R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS* 358 (1985) [hereinafter *PIERCE*].

predominant standard of review since 1912⁶⁷ is that the court should determine whether the agency decision is supported by "substantial evidence." Substantial evidence represents a narrow standard of review, permitting administrators greater discretion in fact-finding than that accorded to trial judges under the "clearly erroneous" standard.⁶⁸

The evidence to be considered in determining whether substantial evidence exists includes not just evidence favorable to the agency decision, but also evidence opposing the agency decision.⁶⁹ Further, the agency decision to which there will be deference is the final or review decision. For example, in a National Labor Relations Board determination, when a hearing officer reinstates an employee, but the full board reverses the hearing officer, any deference the court owes is to the full board.⁷⁰

B. What Is Due Weight and to Which Issues Does It Apply?

The Supreme Court has made it clear that the EAHCA requires the court to conduct a *de novo* review of the state administrative decision.⁷¹ As pointed out, however, the Court also stated that the Act "carries with it the implied requirement that due weight shall be given these proceedings."⁷²

The immediate question is whether this requirement of due weight is the same as the deference a court traditionally gives an administrative determination. At least one circuit has come very close to holding that it

⁶⁷ SCHWARTZ, *supra* note 64, at 597.

What is substantial evidence is a more difficult question. *Id.* It has been pointed out, however, that "it has been generally accepted that 'substantial evidence' represents a narrower standard of review, permitting administrators greater discretion in fact-finding than accorded to trial judges under the 'clearly erroneous' standard." S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 185 (1979). The substantial evidence test applies to formal adjudication and rule-making. Informal adjudication is tested by an arbitrary and capricious standard. *Id.* at 195-96; PIERCE, *supra* note 66, at 360.

The quantum of evidence necessary has been variously described. It has been described as equivalent to the standard used in determining directed verdicts. S. BREYER & R. STEWART, *supra*, at 185. In *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), Judge Leventhal stated that the court must determine whether the agency has "taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."

⁶⁸ See *infra* notes 125-46 and accompanying text.

⁶⁹ See *infra* notes 97-102 and accompanying text.

⁷⁰ PIERCE, *supra* note 66, at 358.

Traditional judicial review of agency findings functions like appellate review of a court decision on the issue of what can be considered. The general rule is that the court is limited to the agency record. The court cannot expand or delete the evidence submitted during the agency proceedings. B. SCHWARTZ, *supra* note 64, at 587.

⁷¹ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982); *School Bd. of the County of Prince William v. Malone*, 762 F.2d 1210 (4th Cir. 1985).

⁷² *Rowley*, 458 U.S. at 206.

does. In *Karl v. Board of Education*,⁷³ the parents disagreed with a placement decision and requested a due process hearing. The parents wanted their mentally retarded daughter to be placed in a commercial food preparation program, and the school proposed to place her in a work/study program. The local due process hearing officer determined that the student should be placed in the food preparation program with a student-adult ratio of nine to one. The school system appealed the decision to the New York State Commissioner of Education, who upheld the placement decision, but reversed the student-adult ratio requirement.

The parents then filed suit in the district court. The district court held that it agreed with the decision of the local hearing officer on the student-adult ratio and indicated that the court's obligation to defer to the judgment of the state educational authorities was diminished by the failure of the hearing officer and the Commissioner to agree. The Second Circuit reversed:

[W]e disagree with Judge Telesca's view that the federal courts need not defer to state educational authorities whenever there is some disagreement among state officers in the course of state proceedings. We believe *Rowley* requires that federal courts defer to the final decision of the state authorities, and that deference may not be eschewed merely because a decision is not unanimous or the reviewing authority disagrees with the hearing officer. There is no principle of administrative law, which, in the event of a disagreement between a hearing officer and reviewing agency over demeanor evidence, obviates the need for deference to an agency's final decision where such deference is otherwise appropriate.⁷⁴

The court's opinion evidences the strong influence of the traditional judicial approach to agency determinations. For example, the court's emphasis on deference to the final administrative determination is the classic view of administrative review.⁷⁵ Indeed, the word deference in itself is interesting, since the Supreme Court in *Rowley* used the words

⁷³ 736 F.2d 873 (2d Cir. 1984).

It at least ought to be clear that the standard of review is something more than an abuse of discretion standard. In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), the court reversed a district court decision which applied an abuse of discretion standard to the LEA's placement decision.

⁷⁴ *Karl*, 736 F.2d. at 877. See also *Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2d Cir. 1983), in which the Second Circuit, in what is clearly a misinterpretation of *Rowley*, stated that in *Rowley*, "the Supreme Court rejected a standard of *de novo* review." *Id.* at 146. If that were the case, there would be little function for judicial review and there would be direct contradiction to the provision that the court base its decision on a preponderance of the evidence.

⁷⁵ See *supra* note 70 and accompanying text.

"due weight," not deference.⁷⁶ Further, *Rowley*, contrary to the decision in *Karl*, does not even specifically state that due weight is to be given to the final administrative determination. Rather the Court left it ambiguous as to the party to whom due weight was to be given, indicating only that due weight was to be given to "administrative proceedings."⁷⁷ Be that as it may, *Karl* does provide strong support for the argument that the reviewing court is to apply a substantial evidence standard.⁷⁸

There was a strong dissent by Judge Pratt in *Karl*:

The majority characterizes this process as 'deferential substantive review.' However characterized, 'deference' or 'due weight' to the administrative proceedings does not mean simple subservience to the last administrator to speak, particularly when, as here, the combined expertise within the administrative system produced three different IEPs. *Rowley's* 'gloss' on a clearly written statute requires only that the district judge give 'due weight' to the views of the administrators; when those views conflict, it does not require him to accept the conclusion of the state's commissioner of education, nor does it relieve him of the burden of making the *de novo* determination required by congress. In ratifying the commissioner's decision, the majority has, in effect, adopted the substantial evidence standard of review that congress carefully rejected. Indeed, by semantically shifting *Rowley's* substantively oriented 'reasonably calculated' standard to a procedural inquiry of whether the determination was a 'reasoned calculation,' the majority has effectively eliminated the substantive step of the *Rowley* analysis.⁷⁹

Decisions made by hearing officers and judges can be placed in four different categories: purely historical fact decisions (for example, the child's age or disability); strictly policy questions (for example, will a developmental approach versus a behavioral approach be adopted to educate a child⁸⁰ or which of two competing methods to teach deaf

⁷⁶ *Rowley*, 458 U.S. at 206.

⁷⁷ *Id.*

⁷⁸ There is support for the proposition that the Supreme Court did not intend to distinguish between state level review decisions and local hearing decisions. See *infra* notes 108-13 and accompanying text.

⁷⁹ *Karl v. Bd. of Educ.*, 736 F.2d 873, 878-79 (2d Cir. 1984). The court went on to state: "[H]e [the judge] properly faced up to the hopeless conflict among the administrators over Lisa's needs and carried out his statutory responsibility by making a *de novo* determination of her appropriate IEP." *Id.* at 879.

⁸⁰ See *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983):

Thus it might be inappropriate for a district court under the rubric of statutory construction to impose a particular methodology upon a state. Nevertheless, for judicial review to have any meaning, beyond mere review of state procedures, the

children to speak is better?);⁸¹ factual questions concerning the appropriateness of a program for a particular child (for example, does this child require a residential program versus a day program?);⁸² and legal questions concerning the interpretation of the statute (for example, whether the statute contemplates providing a particular service as part of the educational requirements imposed on the LEA).⁸³

It is arguable that there should be a different level of review for each, and *Karl* could possibly be limited in its application on the grounds that what was at issue was more a question of educational policy than a factual determination of, for example, whether a given program was appropriate. Parents and administrators agreed in *Karl* on a commercial food preparation program, but disagreed over the educational policy issue of what was appropriate staffing.⁸⁴

Limiting due weight to matters of policy in this manner is consistent with opinions in the Court of Appeals for the First Circuit. *Doe v. Anrig*,⁸⁵ perhaps the most thoughtful case to date addressing the issue of judicial deference, involved a Down's Syndrome child who had been in residential settings his entire life. In February, 1975, the LEA proposed placing the child in a non-residential school setting. The parents rejected the IEP, but entered into an agreement whereby they paid for a residential component and the school paid for placement in a day school.

In 1977, on reevaluation, a new IEP proposed placing the child in a different non-residential school and provided for him to live at home with his parents. The parents rejected the IEP and sought administrative review. The Massachusetts Bureau of Special Education Appeals held that the proposed placement was appropriate but that there should be a one-year transition program. This decision was affirmed by the Department of Education's State Advisory Council for Special Education. The parents sought judicial review.

The district court found that the parents had shown by a preponderance of the evidence that the residential program was the appropriate placement. Both parties appealed the district court decision. The LEA argued that the district court failed to "grant substantial deference to the decisions of the state administrative bodies . . ." ⁸⁶ The parents appealed on the issue of reimbursement.

courts must be free to construe the term "educational" so as to insure, at least, that the state IEP provides the hope of educational benefit.

⁸¹ See generally *Rowley*, 458 U.S. at 207 n.29.

⁸² E.g., *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983).

⁸³ See *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)(discussion of related services required under the Act); *infra* note 113 and accompanying text.

⁸⁴ 736 F.2d at 874.

⁸⁵ 692 F.2d 800 (1st Cir. 1982)(argument before the First Circuit came prior to *Rowley*, while its opinion came after *Rowley*).

⁸⁶ *Id.* at 804.

Addressing the LEA's contention, the First Circuit held:

We disagree with [the LEA] insofar as they would limit the district court to the kind of judicial review of agency action contemplated under the Administrative Procedure Act. The statute unambiguously provides that a reviewing court may take cognizance of evidence not before the state educational agency and must base its decision on the preponderance of the evidence before it. As such, the review mechanism which the Act creates stands in sharp contrast to the usual situation where a court is confined to examining the record made before the agency [citation omitted] and to determining whether the administrative decision is supported by substantial evidence.⁸⁷

The court then went on to indicate that "due weight" was directed toward policy considerations:

[W]e find nothing in the record before us to suggest that "due weight" was not accorded. In addition, the Supreme Court's concern was with courts "substitut[ing] their own notions of educational *policy* for those of the school authorities." [citations omitted] The difference here between Judge Zobel and the school authorities was not a choice of educational *policy*, but resolution of an individualized *factual* issue as to the effect of John's handicap on his ability to benefit from the proposed school setting.⁸⁸

Then, as if to stress the point further, a footnote added:

No contention was or is made here that the residential placement approved by the court was an option which the state would disapprove on general policy grounds.⁸⁹

⁸⁷ *Id.* at 805 (citing *Town of Burlington v. Department of Educ.*, 655 F.2d 428, 431 (1st Cir. 1981)).

The court also rejected the contention that review was limited to whether the state had complied with procedures. This argument had been made in *Rowley*, the court pointed out, and was rejected:

We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make 'independent decision[s] based on a preponderance of the evidence.' S. CONF. REP. NO. 455, *supra*, at 50, reprinted in [1975] U.S. CODE CONG. & ADMIN. NEWS, 1425, 1503. See also 121 CONG. REC. 37416 (1975) (remarks of Sen. Williams).

Id. at 805 (citing *Rowley*, 458 U.S. at 205).

⁸⁸ 692 F.2d at 806.

⁸⁹ *Id.* at 806 n.12.

In *Abrahamson v. Hershman*,⁹⁰ the First Circuit again considered whether a child required a residential placement in order to receive a FAPE. The public school presented the parents with an IEP calling for a day program and the parents appealed to the Massachusetts Bureau of Special Education Appeals (BSEA). The BSEA hearing officer found that the student's residential needs were not educationally related and therefore not the responsibility of the school system. The parents then appealed this decision to the State Advisory Commission, which reaffirmed the hearing officer's decision. The parents then filed suit in federal district court.

The district court held that the child's residential needs were educationally related. On appeal, the school system argued that the district court had failed to give due weight to the BSEA. The Circuit Court disagreed:

To be sure, the district court did not reach the same result as did the BSEA. But, as the Supreme Court noted in *Rowley*, while courts must give "due weight" to state administrative agencies and "be careful to avoid imposing their view of preferable educational models upon the States," [citation omitted] courts ultimately must make "independent decision[s] based on a preponderance of the evidence.

. . . .

The court did not disagree with the state over educational policy, merely over whether the state-licensed program . . . would serve Daniel's own particular needs. Such an issue fell clearly within the scope of the question that *Rowley* left to the courts.⁹¹

Limiting the strong deference articulated in *Karl* to educational policy determinations makes good sense in light of the theory underlying judicial deference to administrative determinations. The history of SEAs and LEAs and the remedial nature of the legislation,⁹² along with the fact that the administrative agencies to be remedied are in control of the administrative procedures⁹³ makes broad deference such as suggested in *Karl* questionable.

Congress left it to the states to set up the administrative procedures.⁹⁴ Indeed, the regulations state that it is the LEA and the SEA that appoint the respective hearing and review officers.⁹⁵ That is a little like Congress dealing with mine safety not by creating OSHA but by telling mine owners to shape up and set up their own watchdog agency to make sure

⁹⁰ 701 F.2d 223 (1st Cir. 1983).

⁹¹ *Id.* at 230.

⁹² See *supra* note 55 and accompanying text.

⁹³ 20 U.S.C. § 1412(5) (1982) requires the state to establish procedural safeguards.

⁹⁴ *Id.*

⁹⁵ 34 C.F.R. § 300.506(b) (1986).

they do it. To give deference on factual issues of the type *Karl* implies would make judicial review meaningless.⁹⁶

Having chosen to attach due weight to the appropriate issues, however, the question remains: what is due weight? Is *Karl* correct at least with regard to educational policy questions—that the standard should be substantial evidence?

Although dealing with the interpretation of specific language authorizing review of NLRB orders under the Taft-Hartley Act, the series of opinions in *NLRB v. Universal Camera Corp.*⁹⁷ provides useful guidance in determining what due weight may mean. In *Universal Camera*, it was alleged that an employee had been discharged as a result of his testimony at an NLRB hearing. If proven, such a discharge was an unfair labor practice under the National Labor Relations Act.⁹⁸ An NLRB examiner made a determination that the discharge was not in violation of the NLRA. The Board, however, reversed the examiner. The Second Circuit addressed the issue of the standard of review, holding that a recent amendment to Taft-Hartley, the Wagner Act, did not change the standard of review. The Board's decision was to be upheld if there was "substantial evidence" in the record. The court then affirmed the Board's decision.⁹⁹

The Supreme Court, reviewing the Second Circuit opinion, vacated and remanded, holding that the Second Circuit had failed to consider the examiner's decision in its review of the Board's action.¹⁰⁰ On remand, considering the hearing examiner's findings, the Second Circuit held that the Board was not justified in reversing the hearing examiner.¹⁰¹

The Supreme Court agreed with the Second Circuit that the standard was the same after the law's amendment, but clearly disagreed that the reviewing court was to look merely to the Board's determination to see if that determination had substantial support. The Court looked to the legislative history of the amendment and Congress' concern in the past for the fairness of determinations by the agency:

Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its

⁹⁶ See *School Bd. of the County of Prince William, Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) ("to give deference only to the decision of the School Board would render meaningless the entire process of administrative review").

⁹⁷ 179 F.2d 749 (2d Cir. 1950), *vacated and remanded*, 340 U.S. 474, *reconsidered*, 190 F.2d 429 (2d Cir. 1951).

⁹⁸ *Universal Camera*, 179 F.2d at 750.

⁹⁹ *Id.* at 754.

¹⁰⁰ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁰¹ *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951).

entirety furnishes, including the body of evidence opposed to the Board's view.¹⁰²

As to the examiner's opinion, the Court stated:

It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report.¹⁰³

Universal Camera makes it clear that the evidence to be considered includes not just evidence favorable to the agency decision, but also evidence opposing the agency decision. Perhaps the debate over "due weight" can be reconciled in this manner, that is, perhaps due weight means the court is to consider the administrative determination or the LEA finding as a factor to take into account in reaching its decision. The Court may have been expressing a concern that just as unfavorable evidence was to be considered in *Universal Camera*, the court is to consider expressly the agency determinations and whatever probative weight they might offer.

While *Universal Camera* dealt with whether consideration should be given to the entire record in applying the substantial evidence test, the case is pertinent to the instant concern. As evidenced by *Universal Camera*, there is a concern that in reviewing administrative determinations the district court not ignore evidence. *Universal Camera* saw the solution as requiring consideration of the entire record. Likewise, the concern under the EAHCA is that the court affirmatively consider the agency decisions.

As a way of providing this considered judgment, the court should give due weight, that is, consider the whole record, including the opinions of the hearing officers. The practical import, then, would be that the trial court should be required to evince a consideration of the administrative proceedings. Ideally this would include explaining why it decided not to follow the administrative determinations. Given that such an explanation could easily become a *pro forma* matter, however, it seems preferable simply to require evidence the court has reviewed the administrative record including the opinions of the administrative hearing officers.

¹⁰² 340 U.S. at 488.

¹⁰³ *Id.* at 493.

C. To Whom/To What Should Due Weight Be Given?

1. The LEA?

If the due weight were limited to strictly educational policy questions, such as choosing the best method for educating the deaf, as opposed to factual questions of whether a particular child would benefit from this rather than that method, it would be logical to provide special consideration to the LEA, since it indeed has the expertise. Several problems, however, exist with the giving of due weight to the determination of the LEA. First, as discussed above, there is some lack of logic to giving special consideration to the group whose actions are sought to be remedied.¹⁰⁴ Second, there is the basic inconsistency of section 1415 providing that the administrative proceedings are to be considered by the judge, making specific provision for the court to hear additional testimony, and making a *de novo* determination by a preponderance of the evidence.¹⁰⁵ The ability to consider additional evidence requires the court to have the concomitant freedom to give less deference to an agency determination, since the agency will not have considered that additional evidence.

Indeed, the Court of Appeals for the Fourth Circuit in *School Board of the County of Prince William, Virginia v. Malone*,¹⁰⁶ after discussing the standard of review articulated by *Rowley*, made it clear that any deference in the district court's review was to be to the state administrative proceedings and not to the school board. The court in *Malone* stated: "To give deference only to the decision of the School Board would render meaningless the entire process of administrative review."¹⁰⁷

2. The Local Hearing Officer or to the State Review Officer?

As noted above, the Second Circuit in *Karl* gave great deference to the *final* state administrative determination.¹⁰⁸ The Supreme Court's language in *Rowley*, however, required that due weight should be given to the "administrative proceedings"¹⁰⁹ while not substituting the court's judgment of "sound educational policy for [that] of the school authorities"¹¹⁰ Interestingly, the Court stated in *Rowley* that a court is required "not only to satisfy itself that the State has adopted the state

¹⁰⁴ See generally *supra* note 55 and accompanying text on the remedial nature of the legislation.

¹⁰⁵ Preponderance is clearly a burden of persuasion question, not a standard of review question. See generally Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914 (1966).

¹⁰⁶ 762 F.2d 1210 (4th Cir. 1985).

¹⁰⁷ *Id.* at 1217.

¹⁰⁸ See *supra* text and accompanying note 75.

¹⁰⁹ 458 U.S. at 206 (emphasis added).

¹¹⁰ *Id.*

plan, policies and assurances required by the Act, but also to determine that the State has created an [Individualized Education Plan] for the child in question which conforms with the requirements of § 1401(19)”¹¹¹

Note here the Court’s requirement that the state provide the IEP, yet it is the LEA which has primary responsibility for developing the IEP.¹¹² The Court clearly equated “state” with the entire administrative process.¹¹³

Assuming that there is special consideration of some type on non-policy questions, when there are two administrative decisions, deference should be given to the administrative officer who was in a position to see the witnesses testify and to question the witnesses himself, hearing the tone and inflection of their voices, and is consequently the best judge of their credibility. Indeed, deference to the officer actually conducting the hearing as opposed to the reviewing officer who merely relies on a record is consistent with the deference given to trial judges by appellate courts.¹¹⁴

Greater deference to the hearing officer is also supported by the fact that under some state administrative proceedings there is no distinction drawn between hearing officers and reviewing officers. In fact, they are interchangeable. While the reviewing officer acts in an appellate capacity one time, he or she will quite often act in a hearing officer capacity another time. Whether a person is a hearing officer or a reviewing officer

¹¹¹ *Id.* at 206 n.27.

¹¹² 34 C.F.R. § 300.341 provides: “The State educational agency shall insure that *each public agency develops and implements an individualized education program for each of its handicapped children.*” (emphasis added). Section 300.342 provides: “Each public agency shall have in effect an individualized education program for every handicapped child. . . .”

¹¹³ See also *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, 890 n.6 (1984) where the Court reiterated this language. *Tatro* also provides a clear example of the *de novo* review of legal questions. In *Tatro*, the hearing officer determined the EAHCA required the provision of Clean Intermittant Catheterization (CIC). The Texas Commissioner of Education adopted the hearing officer’s finding, but the State Board of Education reversed. This is strictly a legal question—whether this was a related service, as opposed to the factual question of whether CIC was required for the child. After repeating the language in *Rowley* concerning scope of review, the court stated, “Judicial review is equally appropriate in this case, which presents the legal question of a school’s substantive obligation under the ‘related services’ requirement of § 1401(17).” Legal questions are subject to greater review. Even under the much more stringent review standards provided by traditional administrative review, questions of law are subject to *de novo* review. SCHWARTZ, *supra* note 64, at 592.

¹¹⁴ See Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1031 (1956).

Some indirect judicial support for deference to the local hearing officer can be found in *Abrahamsom v. Hershman*, 701 F.2d 223, 231 (1st Cir. 1983), where after discussion of the need to give due weight, the court assessed the local hearing officer’s decision, leading to the conclusion that the decision of the initial hearing officer was to be given due weight. Although the review officer may not have been mentioned because it was consistent with the local hearing officer, it is significant that the court was assessing the first decision.

depends merely on whether the person has agreed to perform the particular role. Each receives the same training by the same state agencies. The reviewing officer, in other words, has no greater expertise in the area and has less data upon which to base his decision.¹¹⁵

Further, if one purpose behind limited review is that the district court lacks the specialized knowledge and experience to review the factual determinations in a particular area, it is clear that whatever deference is given should be given to the local hearing officer. To the extent that the reviewing officer has no greater expertise than the local hearing officer, the reviewing officer's decision deserves no special consideration.¹¹⁶ On educational policy issues, however, special consideration should be given to the final administrative determination, if that determination is made by a body which has specialized expertise.¹¹⁷

Although not usual, it is not unheard of to have complete *de novo* review without any deference or due weight being given to an administrative determination.¹¹⁸ The rationale for such independent judgment is quite varied, but includes providing a way to overcome administrative bias.¹¹⁹ The historical development of the EAHCA provides strong support for the importance of overcoming such bias in special education cases.¹²⁰

Given the clear authority to hear additional evidence and decide the case by a preponderance of the evidence, due weight should be limited to purely educational policy decisions and to factual questions where the agency has brought to the proceedings an expertise or advantage not available to the trial court. Some special consideration should be given to the administrative expertise on educational policy where that determination is made by qualified individuals not associated with the LEA. In

¹¹⁵ See, e.g., VA. CODE ANN. §§ 22.1-214(C) (1985), 9-6.14:14.1 (Supp. 1987); Regulations Governing Special Education Programs For Handicapped Children and Youth In Virginia IIC.1.k. (1985).

¹¹⁶ See generally *Community High School Dist. 155 v. Denz*, 1984-1985 EHLR DEC. 556:105 (Ill. App. Ct., 2d 1984).

¹¹⁷ See generally *Doe v. Katherine D.*, 727 F.2d 809, 814 n.3 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985), where the court, in upholding district court's authority to decide an issue the administrative officer refused to decide, stated: "Nor are the necessary findings so technical or specialized that the trial judge is less competent than the administrative hearing officer to make them *de novo*."

¹¹⁸ Jaffe, *supra* note 114, at 1052-53. See also BREYER, *supra* note 67, at 195 n.40. Jaffe points out in a passage that two decades later could well be applied to *Karl*:

It is not our point that in such situations judicial trial *de novo* is the necessary answer. . . . If . . . the legislature has chosen it as the answer it ill behooves a court to boggle at it and attempt to escape its responsibility.

Jaffe, *supra* note 114, at 1054.

¹¹⁹ Jaffe, *supra* note 114, at 1054.

¹²⁰ See *supra* text and accompanying note 55.

accord with the Fourth Circuit's decision in *Malone*,¹²¹ special consideration should not be given to the LEA. However, if the administrative process set up by the state involves hearing officers who are experts in educational policy, their expertise should be given serious consideration.

In a jurisdiction, for example, where both the local and state level administrative reviewing officers are lawyers without extensive training in special education,¹²² no particular deference should be given to their determinations based solely on educational policy grounds. However, in a jurisdiction where individuals with a particular area of expertise are involved in the due process administrative hearings,¹²³ greater consideration should be given to the administrative determination of a preferred educational policy. Such an approach would provide the deference to agency experts which traditional administrative analysis favors, while recognizing the appropriate role of the LEA in the dispute.

On factual determinations, the court should give increased consideration to the hearing officers to the extent the hearing officers are in a better position to determine factual disputes. In large measure, such deference would be operative only on issues of credibility regarding witnesses the trial court has not heard. To the extent the trial court has heard a witness concerning an issue that was also part of the administrative record, the trial court is in as good a position to weigh credibility as the hearing officer.¹²⁴

V. APPELLATE REVIEW OF JUDICIAL DETERMINATIONS

Traditional analysis would lead one to conclude that appellate court review of the lower court's determination would be controlled by the law-fact distinction. Trial court factual determinations are reviewable only under a clearly erroneous standard¹²⁵ whereas decisions of law are decided *de novo*.¹²⁶

Under traditional analysis, questions such as whether the Act requires provision of related services,¹²⁷ whether prior to amendment the Act

¹²¹ See *supra* note 96.

¹²² See *supra* text and accompanying note 115.

¹²³ E.g., Md. [Education] CODE ANN. § 8-415 (1985).

¹²⁴ Such an approach would not be radical. As previously stated, as the general rule, if an agency differs from an administrative law judge it is the agency's finding that is given deference. However, "[a] finding by an ALJ is particularly influential with a reviewing court . . . when the finding is based largely on the credibility of witnesses, since the ALJ was actually present at the time the testimony was given." PIERCE, *supra* note 66, at 358.

¹²⁵ See Jaffe, *supra* note 114.

¹²⁶ *Id.*

¹²⁷ See, e.g., text and accompanying note 113.

contemplated an award of attorneys' fees,¹²⁸ and who under the Act has the burden of proof are reviewed *de novo* by the appellate court.¹²⁹

Factual questions should, however, remain subject to the clearly erroneous standard of review required under Federal Rule of Civil Procedure 52. For example, if it has been decided that the Act requires the LEA to provide parents with notice of procedural rights, it is a factual conclusion whether the LEA actually gave the notice.¹³⁰

All decisions, however, do not neatly fall into the fact or law categories. A third category is one of mixed law and fact requiring application of a legal standard to a particular historical fact or set of facts relating to the legal standard. Many commentators have pointed out that there is less unanimity on the standard to be applied to legal application decisions.¹³¹

Whether application of historical facts to a legal standard constitutes a factual determination governed by the clearly erroneous standard, or a legal question allowing *de novo* review, varies not simply from jurisdiction to jurisdiction, but within jurisdictions and even within topics. An often repeated example is in the area of negligence where the question is application of a reasonable person standard to the facts of a particular incident. Most courts have held that such an application is a question of fact.¹³² Other instances of fact application, however, are less uniform.¹³³

In the context of the Act, most courts have held that the basic issue of whether the LEA's proposal will provide a free and appropriate education is a factual determination.¹³⁴ For example, having determined that

¹²⁸ See, e.g., *Smith v. Robinson*, 468 U.S. 992 (1984). The Act was recently amended to provide for the award of attorneys' fees. 20 U.S.C. § 1415(e)(4) (Supp. IV 1986); see, e.g., Bd. of Educ. of the E. Windsor Regional School Dist. v. Diamond, 808 F.2d 987 (3d Cir. 1986); *Michael F. v. Cambridge School Dep't.*, 1986-1987 EHLR DEC. 558:269 (D. Mass. 1987).

¹²⁹ See, e.g., text and accompanying note 32-62

¹³⁰ See, e.g., *Hall v. Vance County Public Schools*, 774 F.2d 1527 (4th Cir. 1985).

¹³¹ See, e.g., *Weiner, The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1021-24 (1967).

¹³² *Id.* at 1024; but see *Id.* at 1026-31.

¹³³ *Id.* at 1022-24.

¹³⁴ See, e.g., *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 20 (10th Cir. 1985) ("we cannot find clearly erroneous the district court's determination that the response was adequate."); *Geis v. Bd. of Educ. of Parsippany-Troy Hills, Morris County*, 744 F.2d 573, 584 (3d Cir. 1985) ("The Board has referred us to no other evidence that would tend to indicate that the district court's finding [that residential placement was appropriate] was clearly erroneous or, indeed, even erroneous."); *Jackson v. Franklin County School Bd.*, 765 F.2d 535, 539 (5th Cir. 1985) ("Because the district court's findings are not clearly erroneous . . ."); *McKenzie v. Smith*, 771 F.2d 1527, 1535 (D.C. Cir. 1985) ("although the evidence could also support a contrary conclusion, we cannot say that the district court's factual findings were clearly erroneous."); *Colin K. v. Schmidt*, 715 F.2d 1, 6 (1st Cir. 1983) ("our responsibility [is] to uphold the court's findings unless they are clearly erroneous"); *Doe v. Anrig*, 692 F.2d 800, 808 (1st Cir. 1982) ("The task of weighing the evidence, however, is for the trier of fact, which here was the district court. As a reviewing court we are limited to the question of whether the district court's finding was clearly erroneous.");

residential educational programs are contemplated by the Act and that the Act does not require the best educational placement, but merely one that provides some educational benefit, it is a factual question whether a particular child's educational needs require placement in a residential program in order for the child to receive any educational benefit.¹³⁵

In *Abrahamson v. Hershman*,¹³⁶ for example, the court addressed the issue of whether a district court's decision that a child required a residential educational program in order to receive a FAPE should be affirmed.

[T]he [district] court found that educational benefits which could only be provided through residential care were essential if Daniel was to make *any* educational progress at all. Daniel's unique condition was found to demand that he receive round-the-clock training and reinforcement. Given the evidence before the district court, we cannot say that this conclusion was clearly erroneous.¹³⁷

At least one federal circuit court panel, however, has held that it will review *de novo* the appropriateness of a special education placement. In *Department of Education v. Katherine D.*,¹³⁸ the court stated:

We apply a *de novo* standard of review to the questions whether the DOE's [Department of Education] IEPs constituted a "free appropriate public education" within the meaning of the EAHCA. . . . Because those determinations require us to weigh the values underlying the statute in deciding the legal sufficiency of the DOE's offers—we must, for instance, determine the weight to be assigned the explicit congressional preference that handicapped children be educated in classrooms with their peers . . . —we treat them as questions of law.¹³⁹

Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982)(allocation of legal responsibility was "not clearly erroneous").

¹³⁵ See generally Jaffe, *supra* note 114.

¹³⁶ 701 F.2d 223 (1st Cir. 1983); see also Adams Cent. School Dist. No. 090, Adams County v. Deist, 214 Neb. 307, 314, 334 N.W.2d 775, 782, *cert. denied*, 464 U.S. 893 (1983)("We are only to determine if the hearing officer's decision is supported by the evidence, is proper under applicable law, and if it is arbitrary or capricious.")

¹³⁷ 701 F.2d at 227.

¹³⁸ 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985).

¹³⁹ *Id.* at 814 n.2; see also Gregory K. v. Longview School Dist., 811 F.2d 1307, 1314 (9th Cir. 1987)("We review *de novo* the appropriateness of a special education placement."); but see Students of Calif. School for the Blind, 736 F.2d 538, 542 (9th Cir. 1984), *vacated*, 471 U.S. 148 (1985)("We will reverse the district court only if we find that it abused its discretion in granting the preliminary injunction. Abuse of discretion is shown [only] if 'the district court's decision was based on an error of law or on a clearly erroneous finding of fact.'"); Larry P. v. Riles, 793 F.2d 969, 978 (9th Cir. 1984)("The district court made two

The court distinguished this conclusion from the underlying historical factual details that led to the conclusion. Hence, although holding that whether the IEP provided a FAPE was a legal conclusion, it stated that it would apply the clearly erroneous standard to the district court's factual finding concerning the staff's willingness to implement the IEP.¹⁴⁰

Whether a court labels factual application a question of law or a question of fact ought to be based on a more rational approach than one in which we look to the judge or panel of judges that happens to be hearing the case. An attempt should be made to determine whether the rationale underlying the law-fact distinction requires the legal application to be treated as fact or as law. Among the considerations suggested, "there is no reason why judges of an appellate court should defer to a trial judge's conclusion, drawn from undisputed or established facts. . . ."¹⁴¹ It has also been said, "it is . . . important that appellate courts have a free hand to reconcile indistinguishable cases."¹⁴² It has also been argued that

no reason of policy and no rule or statute requires that the trial court's judgment as to the application of a rule of law to the facts found be binding to any extent on the appellate court. The trial judge is neither more expert in the particular field nor more representative of the community than the appellate court . . .¹⁴³

Whatever merits such arguments have as to other cases, such blanket willingness to allow appellate courts to decide legal applications *de novo* as matters of law over-simplifies the application process at least in actions brought under the Act. For example, take a residential placement decision. The legal application question is whether the child requires a residential educational placement in order to receive educational benefit. The Ninth Circuit would decide this case *de novo*.

To the historical facts to which it would apply the law, however, the Ninth Circuit panel would apply a clearly erroneous standard. The district court's determination on issues such as the following would be subject to a clear and convincing standard: is the child retarded/autistic/

findings that addressed this argument which appellant has not shown to be clearly erroneous." This apparent inconsistency within the circuit on the issue of what standard to apply to a specific type of factual application is not new to the Ninth Circuit. See Weiner, *supra* note 131 at 1029-30.

¹⁴⁰ 727 F.2d at 815 n.5 (the court then held that the district court's factual determination was clearly erroneous).

¹⁴¹ Weiner, *supra* note 131 at 1045; but see FED. R. CIV. P. 51 rejecting this position.

¹⁴² Weiner, *The Civil Nonjury Trial and The Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1046 (1967).

¹⁴³ Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 113 (1944).

deaf/etc.; does the child require instruction for more than the standard school day; will the child benefit from home instruction; will the child regress over summer and holiday breaks. If there is conflicting testimony, the trial judge must decide the factual dispute and then apply the known facts to the legal standard. The Ninth Circuit approach presumes there are policy decisions that require the appellate court to perform the latter function *de novo*.

Realistically, however, the legal application analysis is often the functional equivalent of the historical fact determination. In many cases it is the witnesses who are testifying as to the needs of the child. Experts will testify, for example, that a particular placement will or will not provide educational benefit. Issues of credibility and the like are as important to this ultimate issue as to the more purely historical facts.

This lack of distinction is implicit in the rationale of the Court of Appeals for the Fourth Circuit in its adoption of the clearly erroneous standard of review. In *Mathews v. Davis*,¹⁴⁴ the Fourth Circuit affirmed the decision of the district court holding that a school system's continued funding of a residential placement was no longer necessary. In the words of the appellate court:

We are of the opinion the finding of the district court was not clearly erroneous FRCP 52(a). It saw some of the witnesses and heard them testify. It had lived with the case through a multitude of hearings, orders, etc., for a period of five years, and its sensitive, systematic and thorough treatment of the parties and issues in the case from beginning to end is a model. It was in a far better position than are we to make an adjudication as to whatever slight conflict there was in the evidence.¹⁴⁵

VI. CONCLUSION

Burdens of proof and standards of review can have a significant impact on the outcome of proceedings brought under the EAHCA and deserve a more consistently thoughtful approach than has been provided to date. Any confusion that exists may well be the result of courts, including the United States Supreme Court, failing to distinguish the various parts of the administrative process. The simple step of looking realistically at the administrative process rather than lumping together LEAs, SEAs, local due process hearings, and state administrative appeals, as the Supreme Court did in *Rowley*, would be a significant step. A reasoned approach such as discussed above would be a significant improvement.

¹⁴⁴ 742 F.2d 825 (4th Cir. 1984).

¹⁴⁵ *Id.* at 831; see also *Hall v. Vance*, 774 F.2d 1527 (4th Cir. 1985).

